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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 11 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Market Entry and Regulation of)
Foreign-Affiliated Entities)

IB Docket No. 95-22

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COMMENTS OF AERONAUTICAL RADIO, INC.

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COMMENTS

Aeronautical Radio, Inc. (ARINC), by its attorneys, hereby
comments on the Commission's Notice of Proposed Rulemaking
released February 17, 1995.

SUMMARY

The Commission proposes to establish uniform policies governing the entry of foreign companies into common carrier communications by wire and radio in the United States. These policies would govern direct licensing of foreign controlled companies under Titles II and III of the Communications Act and the investment by non-U.S. companies in U.S. common carriers. The Commission proposes to expand the opportunities for foreign participation in U.S. telecommunications based on concepts of reciprocity.

The Commission also raises the question of whether similar policies should be applied to the aeronautical enroute and fixed services.¹ However, the aeronautical enroute and fixed services are fundamentally different than common carrier services. These aeronautical services play a critical role in

¹ See Notice of Proposed Rulemaking, ¶ 98.

aviation safety in the United States, and their proper use in supporting air navigation is vital to the national security. In order to ensure the efficient and effective use of the limited aeronautical spectrum, ARINC has been the sole licensee in the conterminous United States and Hawaii for aeronautical enroute stations operating in the HF bands and the VHF bands 128.825 - 132.0 MHz and 136.5 - 137.0 MHz. ARINC has been able to meet the needs of all aircraft operators (both foreign and domestic) requiring service flexibly while ensuring that the stations are used efficiently and subject to U.S. control.

Policies developed in this proceeding for the common carrier services would be instructive in deciding what action to take on a specific request requiring FCC action under Section 310(b)(4) of the Act pertaining to the aeronautical enroute and fixed services. However, unlike the common carrier services, the Commission has never been presented with questions as to foreign ownership or control of licenses in the aeronautical enroute and fixed services. Neither ARINC nor the FCC can, with any degree of certainty, predict the circumstances under which the Commission would be called upon to make such a determination in the future. Therefore, the public interest would be better served were the FCC to make its determination based upon the specific facts and circumstances presented in that rare case involving the aeronautical enroute and fixed services, rather than extending a general policy,

based on experience in a different service, to these important aeronautical services.

I. ARINC HAS BEEN THE PRINCIPLE LICENSEE OF
AERONAUTICAL ENROUTE AND FIXED STATIONS
FOR OVER 65 YEARS

ARINC was formed in 1929 at the suggestion of the Federal Radio Commission to coordinate and operate radio communications facilities for the air transport industry. ARINC has been responsible for spectrum management and the orderly introduction of advanced technology in support of air navigation for more than 60 years. ARINC is the sole licensee in the aeronautical enroute and fixed services in the conterminous United States and Hawaii.² ARINC currently holds more than 5,000 individual FCC licenses in these services.

ARINC is currently structured as a wholly owned subsidiary of ARINC Incorporated, which is owned by members of the air transport industry. Thus, the Commission has the authority to increase the limits on alien control of ARINC Incorporated pursuant to Section 310(b)(4) of the Act if it determines that the public interest would be served by such action. Today, all officers and directors of ARINC Incorporated and Aeronautical Radio, Inc., are U.S. citizens, and approximately 11% of ARINC

² Section 87.263(a)(3) of the Rules also provides two frequencies in the aeronautical enroute service that can be licensed to entities other than ARINC for local area service to small aircraft (56 passengers or fewer or 8200 kg of cargo or less).

Incorporated stock is owned directly or indirectly by non-U.S. companies. ARINC Incorporated currently has 15 non-U.S. shareholders. In addition, a number of the U.S. shareholders have significant, minority foreign ownership. ARINC has welcomed foreign participation in its activities, and will continue to do so. ARINC does not discriminate against aircraft operators based upon country of origin or whether or not they have an equity participation in the company.

Nonetheless, with the changing face of the air transport industry and the greater globalization of transportation systems, it is conceivable that non-U.S. participation in ARINC's ownership could approach or exceed 25%. Before that happens, however, ARINC will seek a public interest determination from the FCC that the public interest would be served by such an ownership.

The current licensing structure through ARINC does not in any way impede competition or exclude foreign operation of aircraft in the United States. ARINC, for example, offers VHF voice and data service throughout the United States. This coverage is designed, inter alia, to meet the requirements of the Federal Aviation Regulations (FARs)³ to ensure that

³ 14 C.F.R. § 121.99. The Federal Aviation Administration has proposed expanding the scope of Part 121 of the FARs to cover air carriers operating smaller aircraft. See Notice of Proposed Rulemaking, Computer Operations and General Certification and Operations Requirements (FAA Docket No. 28154), 60 Fed. Reg. 16230 (March 29, 1995).

scheduled air carriers exercise operational control over their flights throughout the United States. The voice service is operated by ARINC-provided radio operators connected by private lines to VHF stations located throughout the United States. ACARS, ARINC's air ground data service, is controlled by ARINC's front-end processor (AFEPS) in Annapolis, and connected to VHF aeronautical stations located throughout the United States, Canada, Mexico and Central America by a network of private lines. ARINC, however, also makes arrangements with its customers so that the customers can supply the staff and/or facilities for an aeronautical enroute station or network of stations under ARINC licensee control and supervision. This method of cooperative licensing has permitted ARINC to manage the spectrum so that communications are available for safety and operational control requirements to all airlines and other aircraft operators.

ARINC also develops and implements improvements in aeronautical communications and coordinates these enhancements (and those developed by others) with the airlines, civil aviation authorities, and other service providers, domestically and internationally. Aeronautical communications are international in scope and require a global consensus on common standards. Aircraft operate throughout the world and must be able to communicate with ground systems wherever they fly. The International Civil Aviation Organization (ICAO) enforces this

requirement of commonality through the adoption of Standards and Recommended Practices (SARPs) in Annexes to the Convention on International Civil Aviation. ARINC actively participates in the ICAO process as an official observer and as a frequent member of U.S. delegations.

ARINC also supplements and, to a degree, leads this international process through its Airline Electronic Engineering Committee (AEEC). ARINC's AEEC establishes voluntary technical characteristics for the electronic systems installed aboard air transport aircraft. AEEC has members from airlines around the world and the resulting ARINC Characteristics have achieved international adherence. No single nation or user of the spectrum can unilaterally adopt a new aeronautical system.

ARINC's two fundamental purposes are to ensure both that facilities and services are made available equitably to any aircraft operators requiring them, and that the aeronautical spectrum is used efficiently. ARINC has succeeded in both objectives. In its sixty-five year history, fewer than a dozen disputes over licensing or access to facilities have reached the Commission. Airline travel in the United States has grown to more than 400 million passengers annually, but the aeronautical enroute service actually has less spectrum today than it did in 1950. In 1950, the aeronautical enroute service occupied 5 MHz of VHF spectrum; today it is down to 3.7 MHz.

When the Commission was last called on formerly to review ARINC's operations, it summed up the benefits from ARINC's stewardship of this resource:

ARINC . . . has for the past 50 years managed and coordinated available enroute spectrum in an outstanding manner. In its March 1978 Working Paper the Commission's UHF Task Force noted at page 85:

"As the organization directly responsible for using the frequencies in the 128.8 - 132.0 MHz band ARINC has done a remarkable job. Improvements in operational techniques have been regularly introduced, and the spectrum has been effectively and efficiently used."

Due to the historical development of the aviation industry, and Commission policy, ARINC is the day-to-day manager and Chief architect of the enroute system. The system is primarily designed to meet the needs of scheduled air carriers. However, even businesses operating aircraft fleets on an irregular or unscheduled basis can effectively utilize this enroute service. By entering into a cooperative agreement with one licensee enroute communications can be provided at nearly any location in the country. . . . ARINC provided frequency coordination, continuous evaluation of frequency utilization, participation in FCC and international proceedings relating to enroute spectrum, liability insurance for all users at each station, materials and information relating to station operations, inspection personnel, and maintains an up-to-date data base. Generally, the users are highly satisfied with the present enroute service which is characterized by the "one station per location - service via cooperative arrangement" concept embodied in Section 87.291. Very few complaints have been

received during the many years the rules have reflected this policy.⁴

These reasons for relying upon ARINC continue to the present.

II. AERONAUTICAL COMMUNICATIONS PROMOTE SAFETY OF FLIGHT AND ARE IMPORTANT FOR NATIONAL SECURITY

The retention of the limitation in Section 310(b) of the Act as to foreign control of aeronautical enroute and fixed communications is a reflection of the important role these services play in flight safety and national security in the United States. These facilities continue to support air navigation in U.S. airspace and in the Flight Information Regions (FIRs) adjacent to our territory.

High frequency stations operated by ARINC in the aeronautical enroute service provide operational control communications for air transportation companies and air traffic service (ATS) communications for the FAA to aircraft operating in the U.S. FIRs, which include most of the Pacific Ocean, most of the Caribbean Sea, and about a quarter of the North Atlantic. ATS communications are also provided by these stations to U.S. military aircraft to ensure adequate separation between these airplanes and civil aircraft. Over the United States and Canada, ARINC's ACARS mobile data system

⁴ In the Matter of Petition for Rulemaking to Amend Part 87 to Allow More Than One Aeronautical Enroute Station at Any One Location (RM-3113), Memorandum Opinion and Order, released January 24, 1980, ¶ 21 (footnote omitted).

provides pre-departure clearance to aircraft and final release of aircraft onto some of the North Atlantic tracks. Thus, these aeronautical facilities are important for both national security and aviation safety.

The aeronautical enroute service also supports U.S. airline participation in the Civil Reserve Air Fleet (CRAF), whereby airlines must make aircraft available for Department of Defense operations in times of national emergency. The communications system that supports CRAF aircraft in the United States is the aeronautical enroute service. This only serves to underscore a need for U.S. control of these facilities that is different from that of most common carrier operated services.

III. THE MARKET STRUCTURE FOR AERONAUTICAL SERVICES DIFFERS FROM THAT FOR COMMON CARRIER SERVICES

Under the Commission's proposal, reciprocal treatment and access to the U.S. market would be made available to foreign common carriers where the Commission determines that "effective market access" to U.S. carriers is afforded by the country in which the new entrant or investor is based. ARINC has long supported the use of reciprocity to encourage other nations to liberalize their telecommunications, and thus generally supports the Commission's proposals as to common carriers.

The Commission's analysis of the common carrier market is extensive and well thought out, but the Commission also asks

"whether the effective market access test also should be applied to . . . aeronautical licensees."⁵ ARINC submits that the market factors are sufficiently different and the circumstances surrounding the current licensing of the aeronautical enroute station sufficiently unique that rules of general applicability would be difficult to fashion at this time.

The international marketplace for aeronautical services is fundamentally different from that which has developed from common carrier telecommunications. Under the current rules and policies of the FCC, it is difficult to predict the circumstances under which a request for waiver of alien restrictions under Section 310(b)(4) of the Act would arise from aeronautical licenses. Under one possible scenario, investment by foreign entities in U.S. airlines and/or investment by foreign airlines directly in ARINC Incorporated could at some future time lift the attributed foreign ownership of ARINC Incorporated over 25%. In this instance, ARINC would petition the FCC for a declaratory ruling that such non-controlling indirect ownership by aliens would not violate the public interest. An "effective market access" test would be difficult to apply here because it would be strictly fortuitous that the investor that triggered the petition was from a nation with liberal or restrictive regulations as to licensing

⁵ Notice of Proposed Rulemaking, ¶ 98.

aeronautical facilities to U.S. companies. Nonetheless, ARINC believes that it would be appropriate for the FCC to review ARINC's management and ownership under the then-existing facts and circumstances to determine that the degree of foreign influence proposed would not contravene the public interest.

The question of alien ownership might also arise were an alien-controlled company to seek direct licensing in this service. In this instance, a review effective market access may become a broader inquiry than presented in the Commission's analysis of common carrier telecommunications. The common carrier market has grown out of national monopolies, often with past or present government ownership, who are reaching out from their home countries to establish global networks. Thus, most analyses of effective market access for common carriers would focus on bilateral reciprocity between the United States and the markets in which the foreign carriers had significant facilities based presence.⁶ In the aeronautical market, however, local regulations of third party nations in which ARINC and foreign companies seek to operate by resale can be as important as equal access to markets where the foreign company has facilities. A company or airline from a nation with relatively liberal telecommunications laws could serve as the stalking horse for entry by interests who promote and/or benefit from restrictive regulation in other nations. The FCC

⁶ Notice of Proposed Rulemaking, ¶ 40.

must be able evaluate the global market for aeronautical telecommunications in order to assess whether ARINC and the U.S. airlines have effective market access to aeronautical communications licenses in foreign countries.

Effective market access for aeronautical services should also consider differences in allocation and licensing authority. For example, in the United States, 3.7 MHz of spectrum is made available for operational control communications in the aeronautical enroute service. In many other countries, only 0.6 MHz (or less) is available which has the practical effect of limiting access by ARINC. Part of this distinction is a result of FAA requirements that airlines operate a flight dispatch system of operational control and assure that communications between the dispatcher and pilot is always available.⁷ Other nations do not require the same level of communications for their national carriers, but the FAA requirement follows U.S. airlines around the world. Effective market access for ARINC and U.S. airlines must be based upon realistic spectrum availability.

Both of these hypothetical situations are unlikely in the foreseeable future and should not form the basis upon which a rule or policy of general applicability in the aeronautical services. For example, a hostile takeover of ARINC by foreign entities might present an entirely different set of

⁷ 14 C.F.R. § 121.99.

considerations. The Commission should keep its options open in the aeronautical services at this time. The aeronautical enroute and fixed services are licensed principally to ARINC, and potentially can present different considerations of aviation safety and national security than common carrier authorizations.


In summary, the Commission has extensive experience with the market for common carrier systems and requests for waiver of the limits of Section 310(b)(4) of the Act, that can assist the agency if it is presented an alien control issue in the aeronautical service. However, the Commission should base its decision on the public interest considerations presented by the specific transactions, including safety and national security, rather than attempting to fashion a fixed policy for this service at this time. ARINC does, however, concur with the

basic thrust of the Commission's proposals as to common carrier telecommunications.

Respectfully submitted,

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